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Office of Legal Counsel

Office of the
Assistant Attorney General

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MEMORANDUM FOR WM. BRADFORD REYNOLDS,
COUNSELOR TO THE ATTORNEY GENERAL

Re: Effect of Legislative Prohibition Against
Assistance for Panama on Drug Enforcement
Administration Law Enforcement Activities

Introduction and Summary

This memorandum responds to your request for a legal analysis of the impact of section 570 of the Continuing Resolution, Pub. L. 100-202, 101 Stat. 1329 (1987), on the Drug Enforcement Administration's (DEA) law enforcement activities in Panama. Section 570 provides that unless the President certifies to Congress that the Government of Panama has met certain requirements, no United States assistance, with the exception of a few specifically enumerated forms of assistance, shall be obligated or expended for Panama in this fiscal year and any fiscal year thereafter. The President has not made a certification pursuant to section 570. Accordingly, the issue raised by section 570 is whether the grants of funds and material that the DEA currently makes to Panamanian law enforcement authorities in Panama in the course of DEA's law enforcement activities in that country constitute "United States assistance." If such payments and grants constitute assistance and do not fall within any of the enumerated exceptions to section 570's general prohibition, they cannot legally be made.

For the reasons discussed below, we conclude that such payments and grants of material constitute "United States assistance" unless they are made in payment for specific services rendered by the local authorities in connection with specific DEA law enforcement activities. We suggest that compliance with section 570 would be accomplished most easily if such payments or grants are made pursuant to appropriate contracts and do not exceed the fair market value of the services received from local law enforcement authorities.

Analysis

For over a decade, DEA has maintained a law enforcement presence in the country of Panama. DEA staffing of its Panama Country Office currently consists of the Country Attache, four Special Agents, four Special Agents-Pilots and two Special Agents on TDY to Panama in support of a special operation. All DEA drug enforcement operations there are conducted through the Panama Defense Forces (PDF). DEA advises that much of its information

is obtained through the use of informants. DEA further advises that although virtually all payments are made to DEA informants directly, rather than through the PDF, on very rare occasions DEA will give money to the PDF to pay an informant who is developed by the PDF in support of a DEA operation. In addition, DEA sometimes furnishes vehicles and investigative equipment and expenses for use by the PDF.

As part of the Continuing Resolution, Pub. L. 100-202, 101 Stat. 1329 (1987), Congress enacted Section 570, entitled "Assistance For Panama." That Section provides in pertinent part that unless the President makes certain certifications:¹

[N]o United States assistance (including any such assistance appropriated and previously obligated) shall be obligated or expended for Panama in this fiscal year and any fiscal year thereafter, and none of the funds appropriated or otherwise made available in this Act, or any other Act, shall be used to finance any participation of the United States in joint military exercises conducted in Panama during the period January 1, 1988, through December 31, 1988.

Section 570(a).

The statute defines the term "United States assistance" as "assistance of any kind which is provided by grant, sale, loan, lease, credit, guaranty, or insurance, or by any other means, by any agency or instrumentality of the United States Government." Section 570(c) (emphasis added). The plain language of the statute supports the conclusion that any gratuitous transfer of money or goods by DEA is covered by the statute's definition of "United States assistance."² The provision clearly pertains to DEA, as the statute by its terms applies to "any agency or instrumentality of the United States Government." Section 570's definition of "assistance" is equally broad. After specifying several types of assistance, such as grants and loans, the sec-

¹ For example, the President must certify that the Government of Panama (1) has demonstrated substantial progress in assuring civilian control of the armed forces and that the PDF and its leaders have been removed from non-military activities and institutions; (2) is conducting an impartial investigation into allegations of illegal actions by members of the PDF; and (3) has reached a satisfactory agreement with members of the opposition forces on conditions for free and fair elections. Section 570(a).

² The first rule of statutory construction is to examine the language of the statute itself. See, e.g., Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979); Greyhound Corp. v. Mt. Hood

tion refers to assistance "of any kind" provided "by any other means." Certainly any gratuitous furnishing of equipment, vehicles, and expenses by DEA to the PDF would fall within that all-inclusive language.³

The Drug Enforcement Administration argues, however, that under "generally accepted principles of statutory construction," the plain language of section 570 should not be read broadly to include DEA's transfers of money or goods related to case-making activities in Panama in its list of prohibited types of assistance.⁴ Specifically, DEA states that under the principle of statutory construction known as eiusdem generis, words of general meaning which precede or follow words of specific meaning are limited in interpretation to the categories or classes of articles or matters of the same kind as those specifically enumerated. Applying that rule to section 570(c), DEA argues that the words "by any other means" would refer to types of assistance similar to assistance given by "grant, sale, loan, lease, credit, guaranty, or insurance." DEA argues that if such were not the case, there would be no need for Congress to specify the words "grant, sale, loan, lease, credit, guaranty or insurance."

The doctrine of eiusdem generis applies when the following conditions are met: (1) the statute contains an enumeration by specific words; (2) the members of the enumeration suggest a class; (3) the class is not exhausted by the enumeration; (4) a general reference supplements the enumeration; and (5) there is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires. 2A Sutherland, Statutory Construction § 47.18 (Sands 4th ed. 1984).

There are three insurmountable obstacles to DEA's use of the eiusdem generis doctrine in support of its view that transfers of money and goods to local law enforcement authorities may not constitute assistance. First, the fifth condition for application of the doctrine is not met in this case. The use of the word "any" in the phrases "assistance of any kind" provided "by any other means" (emphasis added) suggests that Congress intended to include any form of assistance not comprehended by its enumerated terms. Second, even if the conditions for application were met, the application of the doctrine lends further support to the conclusion that DEA's activities indeed are covered by the statute. The common feature of the specifically enumerated words -- grant, sale, loan, lease, credit, guaranty, or insurance -- is that they all represent some sort of transaction involving the conveyance of money, goods, or services. Assuming arguendo that

² (Cont.) Stages, Inc., 437 U.S. 322, 330 (1978).

³ There is no legislative history that sheds further light on the definition of assistance.

⁴ Letter of February 22, 1988, to the Attorney General, from John C. Lawn, Administrator, DEA.

the ejusdem generis doctrine applies, then the general words "or by any other means" must be interpreted to encompass other transactions involving money, goods, or services whereby such things are conveyed to another party under various conditions. Thus, the definition encompasses gratuitous transactions between DEA and the PDF involving the conveyance of money and goods. Finally, such transfers of goods or money appear to fit within the meaning of the specifically enumerated term "grant," thus making analysis of the ejusdem generis doctrine superfluous.⁵

Nor do we find persuasive the arguments of the Department of State, made in support of the position that Congress did not intend to limit DEA's activities in Panama through its broad definition of assistance.⁶ The State Department first notes that the term "assistance for" a specific country is a term of art which refers to specifically funded assistance provided to that country through the State Department, such as assistance provided pursuant to the Arms Export Control Act or Foreign Assistance Act. We have been unable to find any evidence, however, in the statute or its legislative history to support this position. On the contrary, as mentioned above, the statute states that its prohibitions apply to "any agency or instrumentality of the United States Government." This language necessarily includes within its prohibitions agencies other than the State Department, as well as programs other than the Arms Export Control Act, the Foreign Assistance Act and similar programs. In short, through its application of the prohibition to all agencies of the United States, Congress clearly manifested an intent that the prohibitions apply to federal government activities and programs beyond those administered by the Department of State.

Second, the State Department argues that Congress clearly intended that the Department of State's narcotics control assistance to Panama, authorized pursuant to 22 U.S.C. 2291, would continue. The State Department relies exclusively on subsection 2291(a)(4), which provides that such narcotics control assistance is to be provided "notwithstanding any other provision of law." 22 U.S.C. 2291(a)(4). Whether or not this language is effective to permit the continuation of the Department of State's narcotic assistance program to Panama despite section 570's subsequently enacted general prohibition, DEA does not enjoy a similar general exemption from the operation of other laws.

⁵ One of the definitions of the word "grant" contained in Webster's Third New International Dictionary is "give, bestow, confer . . . to make a conveyance of."

⁶ See letter of March 17, 1988, from Michael Matheson, Deputy Legal Adviser, Department of State to John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice.

The State Department also observes that the prohibition in section 570(a) against joint military exercises is separate and distinct from its prohibition against "United States assistance." Citing that distinction as indicative that Congress viewed joint exercises -- such as those between DEA and Panama -- as distinct from "United States assistance," the State Department appears to argue that had Congress intended to prohibit gratuitous transfers of goods and services by DEA, it certainly would have done so in the same explicit manner in which the military exercises were prohibited. We do not find this argument persuasive. The term "United States assistance" would not have prohibited joint military exercises so long as both Panama and the United States bore its own costs in the joint exercise. Nor does it prohibit joint operations by the DEA and local Panamanian authorities so long as DEA is pursuing an authorized objective and the local Panamanian authorities are bearing their own costs. Thus, we do not believe that Congress' specific prohibition of joint military exercises limits in any way the intended meaning of the term "United States assistance."

Finally, we do not believe that it is possible to distinguish transfers of money and goods that DEA provides local Panamanian authorities from other assistance on the ground that the former kind of assistance directly benefits the United States. Presumably, all assistance to foreign governments is given to advance some interest of the United States, be it gaining good-will, promoting political stability, supporting economic growth, or some other goal. Indeed, the Central Intelligence Agency's intelligence activities in Panama certainly are conducted for the benefit of the United States, yet Congress explicitly excepted assistance in connection with certain of these activities from section 570's general prohibition on assistance. See 570(c)(6). Congress' creation of this specific exception is a strong indication that Congress did not intend generally to distinguish from assistance that benefited only Panama and assistance that would also provide benefits to the United States.

It has also been suggested that section 570(c)(6), providing an exception to the general prohibition for assistance in connection with "activities undertaken solely to collect necessary intelligence," covers DEA's activities with the PDF.⁸ DEA's

⁷ We note that the President has authority under section 614 of the Foreign Assistance Act to waive section 570. See 22 U.S.C. 2306. A section 614 waiver, however, authorizes only the furnishing of assistance under the Foreign Assistance Act. It would not permit the DEA to use funds available under its appropriation for assistance to Panama.

⁸ The statute also specifically states that the term "United States assistance" does not include (1) assistance under Chapter 1 of part I of the Foreign Assistance Act of 1961 insofar as such assistance is provided through private and voluntary organiza-

activities in Panama, as the DEA readily acknowledges,⁹ are not intelligence activities, but investigative law enforcement activities with clearly defined law enforcement goals: to curtail the importation of cocaine into the United State and to locate and expel DEA fugitives.¹⁰ Law enforcement activities, of course, like most government activities, involve collecting information; but we do not believe that they for that reason alone become "activities undertaken solely to collect necessary intelligence." This phrase has become a congressional term of art, referring to activities undertaken to collect national security information about foreign powers and organizations. See the so-called Hughes-Ryan Amendment, 22 U.S.C. 2422 (imposing requirements on certain Central Intelligence Agency activities).¹¹

Moreover, we note that Executive Order 12333, which represents a comprehensive presidential directive on intelligence activities, defines intelligence activities as "all activities that agencies within the Intelligence Community are authorized

⁸ (Cont.) tions or other nongovernmental agencies; (2) assistance which involves the donations of food or medicine; (3) disaster relief assistance; (4) assistance for refugees; (5) assistance under the Inter-American Foundation Act; (6) assistance necessary for the continued financing of education for Panamanians in the United States; and (7) assistance made available for termination costs arising from the requirements of the section. Section 570(c)(6). None of these exceptions, however, pertain to DEA's activities.

⁹ DEA orally agreed that its activities do not constitute intelligence activities as contemplated by section 570(c). Conversation of Rosemary Hart, Senior Counsel, Office of Legal Counsel with Robert Richardson, Deputy Chief Counsel, DEA.

¹⁰ See February 22, 1988, letter to the Attorney General from John C. Lawn, Administrator, DEA.

¹¹ The Hughes-Ryan Amendment provides:

No funds appropriated under the authority of this chapter or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States. Each such operation shall be considered a significant anticipated intelligence activity for the purpose of section 413 of title 50 [i.e. section 501 of the National Security Act].

to conduct pursuant to this Order." See section 3.1(e). The DEA is not included in the Executive Order's definition of agencies within the Intelligence Community. See section 3.1(f). Thus, we believe that the definition of intelligence activities in this order is yet another indication that the ordinary activities which DEA conducts in collecting information relating to law enforcement do not constitute intelligence activities as that term is used in section 570.¹²

Of course, section 570 does not prohibit per se all transfers of money and goods to Panama, but only transfers in the form of assistance. Specifically, Congress did not prohibit agencies of the United States from buying services from the Panamanian government.¹³ Accordingly, DEA may make transfers of

¹¹ (Cont.) 22 U.S.C. 2422 (emphasis added).

¹² It does not follow from this conclusion, of course, that activities conducted by DEA could never constitute intelligence activities, only that the DEA's routine gathering of information in pursuit of law enforcement objectives is not to be regarded as an intelligence activity.

¹³ Section 507(c) does include assistance "provided by . . . sale" within its definition of prohibited assistance. The concept of assistance through a sale appears on its face to be an anomaly because market transactions are generally distinguishable from the provision of aid to foreign governments. We believe that the phrase is best understood as prohibiting only sales below fair market, a kind of transaction which can readily be understood as providing aid to a foreign government. Also supporting this conclusion is the fact that the United States Embassy and the Southern Command purchase essential services from the government of Panama and its instrumentalities. Congress gave no indication that it wanted to frustrate the operation of our embassy and the Southern Command by terminating these routine transactions. Accordingly, because DEA's contracting authority authorizes it to purchase services only at a fair market price, we do not view the exercise of such authority as the provision of assistance by sale.

money and goods to Panamanian law enforcement authorities as payments for specific services provided to DEA under contract, without running afoul of section 570.¹⁴

In order to avoid any question as to whether a particular transaction constitutes a purchase, we suggest that DEA should be in a position to demonstrate that (1) any money or goods provided to the PDF were provided in exchange for specific services rendered to DEA by the PDF; (2) the services provided by PDF are services that were used to advance an activity in which DEA is authorized to engage; and (3) that DEA received services from the PDF equivalent in value to its payments, or the fair market value of the goods it transferred to the PDF.¹⁵ For example, DEA must be able to document that cars rented for PDF use were actually used by the PDF in the performance of a specific activity designed to further a DEA narcotics investigation in Panama.¹⁶ Likewise, payment of funds to the PDF to be used to pay informants would be permissible if the information sought to be obtained was relevant to a particular DEA investigation.¹⁷ Similarly, giving the PDF equipment such as surveillance equipment is permissible if the equipment was provided to the PDF in support of a DEA operation, the surveillance was in fact conducted

¹⁴ There is no doubt DEA has authority to enter into such contracts, for a federal agency has inherent authority to make contracts to accomplish its authorized activities. United States v. Salon, 182 F.2d 110, 111 (7th Cir. 1950); United States v. Maurice, 26 F. Cas. 1211, 1217 (C.C.D. Va. 1823) (No. 15747). See generally, Cibinic and Nash, Formation of Government Contracts 20-62 (2nd ed. 1986). Various federal statutes contain (1) rules to be followed in using appropriated funds and (2) requirements to be met when contracts are used. See, e.g., 31 U.S.C. 1301 (appropriations shall be applied only to the objects for which the appropriations are made); 31 U.S.C. 1501(a)(1) (an amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence); 31 U.S.C. 1517 (prohibited obligations and expenditures); 41 U.S.C. 251 et. seq. (using procurement contracts and grant and cooperative agreements).

¹⁵ The Federal Acquisition Regulation requires contracting officers to "[p]urchase supplies and services from responsible sources at fair and reasonable prices." 48 CFR 15.802(b)(2). See generally, 48 CFR 15.800 et. seq. (Price Negotiation). In this memorandum, we are using the term "fair market value" to refer to fair and reasonable prices.

¹⁶ We note that DEA's law enforcement activities in Panama fall within DEA's mandate to investigate controlled substance violations under the Controlled Substances Act, Pub. L. 91-513, 84 Stat. 1242 (1970), as amended by the Anti-Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat. 3207 (1986).

¹⁷ DEA has specific authority to pay informants. 21 U.S.C. 886.

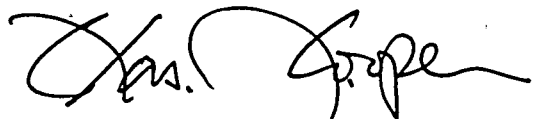
by the PDF in support of that operation, and the services provided by the PDF were equivalent to the fair market value of the equipment it received.

We believe that DEA would be well-advised to enter into appropriate contracts to support a characterization of the transactions as purchases as opposed to assistance. Such contracts should specify the particular services local Panamanian authorities are providing to the DEA in the context of the DEA's operations in exchange for the particular forms of payment that the DEA is making. In any event, DEA should take steps to ensure that it is receiving fair market value for its payments or transfer of goods.¹⁸

Finally, we note that policy decisions of the National Security Council (NSC) may preclude the DEA from making payments to Panamanian authorities. The NSC has determined that all payments to the government of Panama should be withheld, with exceptions not here relevant, in order to honor the decision of President Delvalle to prohibit payments to any public entity or agency controlled by the Noriega regime. See Memorandum for the Attorney General from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel (March 12, 1988). In view of this decision and the government's overriding interest in denying the Noriega regime access to U.S. currency, we advise the DEA to consult with the NSC and the State Department before making any payments.

CONCLUSION

For the foregoing reasons we believe that DEA payments and grants of material to local Panamanian authorities are forms of "United States assistance" prohibited under Section 570 of Pub. L. 100-202, unless such payments or transfer of goods are contractual payments to such authorities for specific services rendered in the context of specific operations.



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¹⁸ In making this recommendation, we do not preclude use of any other method for documenting DEA's transfer of goods and services to the PDF. We only state our belief that if DEA adheres to the accounting method described above, the transactions in question would fall well within legal parameters.